No. 14817

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT RIDDELL, Collector of Internal Revenue, and HARRY C. WESTOVER, former Collector of Internal Revenue,

Appellants,

vs.

EARL CALLAN and HELEN W. CALLAN,

Appellees.

On Appeal From the Judgment of the United States District Court or the Southern District of California.

BRIEF FOR THE APPELLEES.

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Opinion Below.

The memorandum of the District Court in the companion case of *Earl Callan v. Westover* denying defendants' motion to dismiss [R. 55-73], also applicable to this case, is reported at 116 Fed. Supp. 191.

Jurisdiction.

This appeal involves income taxes for the years 1946 and 1948. The taxes in dispute were paid on February 5, 1951. [R. 12, 115.] Claims for refund were filed on August 14, 1951. [R. 17, 35, 77, 82.] More than six months elapsed from the date of filing of the claims

without the Commissioner rendering a decision thereon, nor disallowing the claims. [R. 18, 36, 77, 83.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on March 10, 1952, the taxpayers brought an action in the District Court for recovery of the tax paid. [R. 3-38.] Pleadings showing existence of the jurisdiction of the District Court under 28 U. S. C., Section 1340, are the Complaint [R. 3-38] and its Amendment [R. 52], and Answer to Amended Complaint. [R. 73-84.] The judgment was entered on February 16, 1955. [R. 112-115.] Within sixty days and on April 15, 1955, a notice of appeal was filed. [R. 121-122.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Appellee would agree with appellant's statement of the question presented, except that this question arises in this appeal with the background that:

(1) It is stipulated in the present suit that the loss, except for that held to be properly sustained and deductible in 1938, shall be deemed to be loss sustained by the taxpayer in 1948 [R. 85, 97; App. Br. p. 5], and

(2) Pursuant to that stipulation, and under a form of verdict approved by both counsel [R. 113, 168], the jury in the court below found the loss was *not* sustained and deductible in 1938. [R. 113-114.]

The question presented is more accurately stated, therefore, as follows:

> "Did the court below err in its submission to the jury of this question: Whether a loss caused by the

destruction of taxpayer's property by flood in 1938 was sustained in that year or was sustained in 1948, when taxpayer's claim against the Los Angeles County Flood Control District was settled."

Statutes and Regulations Involved.

The legal effect and practical application of the statutes and regulations below must of course be determined by the judicial decisions interpreting them.

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

Internal Revenue Code of 1939:

Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

Art. 23(e)-1. Losses by individuals.—

* * * * * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113(b).

* * * * * * * *

Treasury Regulations 111, Sec. 29.23(e)-1, promulgated under the Internal Revenue Code of 1939, contain identical language.

It is pertinent to note that examination of the legislative history of section 23(e) shows that it first became a part of the United States Revenue Laws in the Act of 1894, section 28, which allowed the deduction of losses by individuals "not compensated for by insurance or otherwise . . ." (See Seidman's *Legislative History of Federal Income Tax Laws* (1938), at page 1018.) These same words have been used by Congress in the same conjunction in every income tax law thereafter and through the taxable years in question.

Additional Statutes will be quoted in this brief where pertinent.

Statement.

It is appellee's position that determination of the tax year in which a loss is sustained is a question of fact; that Judge Mathes in the court below properly submitted that question to the jury, and properly instructed the jury.

Jury trial was properly demanded [R. 37], and this issue was stipulated to be tried. [R. 85.]

Appellant's Statement (App. Br. pp. 4-7) should be amplified by the following:

1. The court's memorandum of decision [R. 55-73] is relevant herein in its entirety.

2. The entire instructions to the jury [R. 160-163] on this fact issue are important, for example:

> ". . . the jury should consider all the surrounding circumstances as shown by the evidence . . ." [R. 161.]
>
> "The mere existence of a claim or suit for recovery against the Los Angeles County Flood Control District is not enough in and of itself to prevent the loss from being deductible in 1938.
>
> "A taxpayer may not reasonably postpone the deduction for loss until some later and possibly more tax advantageous year by pursuing unreasonably a claim for possible reimbursement for his loss, since a taxpayer is not allowed to pick and choose the year of loss for the sole purpose of gaining the most advantageous tax benefit." [R. 162.]
>
> "The . . . fact that no deduction was claimed . . . on . . . Callan's 1938 tax return may be considered in determining the issue as to whether or not he in good faith postponed claiming a tax deduction for the loss." [R. 162-163.]

3. The evidence introduced at the trial included not only the testimony concerning attorneys' and engineers' *advice* to plaintiff, but also testimony of the flood evidence presented to such attorneys and engineers, their fee arrangements with plaintiff, their personal belief in recovery, and plaintiff's own belief that he would recover. The evidence also included photographs of the properties and the flood, the death of the chief trial attorney in the flood case, testimony of advice from plaintiff's tax advisor in February, 1939, and a stipulation of facts. [Stipulation at R. 87-99, other evidence not printed but referred to at R. 184-193.]

Significant in the stipulation of facts [R. 93] is the evidence that in December, 1938, and at all material times thereafter, Appellee diligently prosecuted his case against the Los Angeles County Flood Control District.

In the court below, Appellant's counsel thoroughly argued to the jury the reasons for which he felt that jury should find for the defendants on the year of loss issue. [R. 188-189.]

Plaintiff's position was also argued to the jury, and proved more convincing to the jury. [R. 183-188, 191-193.]

The Stipulation of Facts [par. XXV, R. 99] provided in material part, and the jury verdict below [Question 2, R. 114] held in other material parts, that a substantial portion of taxpayer's losses at issue herein were attributable to the operation of a business regularly carried on by him.

Appellant's Brief Is Defective in Specification of Errors.

Under the caption "Statement of Points To Be Urged", Appellant's Brief, pages 7-10 inclusive, sets out 16 allegations of error. While appellee is thoroughly confident that these allegations must fail on the merits, appellee respectfully submits that the following numbered "Points" of appellant should be ignored in that, as specifications of error, they fail to comply with the requirement of Rule 18(2)(d) of this court that a specification of error in instructions given or refused must contain "the grounds of the objections urged at the trial." The deficient specifications are appellant's "Points" numbered 3, 4, 5, 6, 7, 8, 9, 15 and 16.

"Points" 8 and 9 do not even contain any reference to the record. The other "Points" refer to the record, but it is clear that ". . . citing the transcript of record clearly does not meet the requirement of Rule 18(2)(d) that the grounds of the objections urged at the trial shall be 'set out' in the specification." (*Kobey et al. v. U. S.* (C. A. 9, 1953), 208 F. 2d 583.)

Summary of Argument.

Determination of the tax year in which a loss is sustained is a question of fact.

The entire record in this case is replete with evidence from which argument was properly made by both counsel to the jury, and from which the jury was free to choose its own inferences from the evidence of all the surrounding circumstances of this particular case, and select its verdict of ultimate fact. The jury found for plaintiff on the evidence.

Appellant's objective in this appeal is to convince this court that, upon an oversimplified characterization of the fact pattern of this case, the question of the year of loss must be determined adversely to appellee as a rule of law. By oversimplifying the factual circumstances and seeking a law rule on a fact question, appellant attempts to thwart the very purpose of a jury and a trier of facts, who have first hand observation of all the testimony and evidence, and are the traditional institution to choose among possibly conflicting inferences from the evidence.

The appellate courts must not be used as substitutes for juries.

The United States Supreme Court and the United States Court of Appeals for the Ninth Circuit and other courts have repeatedly held, expressly and impliedly, that determination of the tax year for a loss deduction is a factual determination.

Appellant's argument to the contrary on brief is in large measure based upon appellant's misconstruction of its cited cases. Appellant's argument of those cases has distorted them out of context, and factual determination in those cases have been urged by appellant as rules of law.

Appellant attempts to draw an arbitrary line distinguishing the application of the same exact Code section in different categories of fact situations, viz. (Applicant's Br. p. 11):

> ". . . This is not a case like embezzlement . . . Nor is it a case of a business loss . . ."

The fallacy of such an attempted distinction is demonstrated by the fact that a substantial portion of appellee's loss herein *was a business loss.* [R. 99, 114.] Moreover,

the argument is obviously circular: it attempts to obtain a ruling that this is not a factual question for the jury by a specious distinction based solely on an arbitrary argument, directed without foundation to relative factual merit.

In the present case, there existed a very real occasion for the exercise of judgment of the time when a closed and completed loss would occur. That judgment was the determination whether taxpayer would realize his investment by recovery against the Los Angeles County Flood Control District. The judgment required for that determination may not be measured with more or less exactitude than appraisal of the entire factual evidence of the particular case. This is true of all loss cases, be they stock, contract, tort or business, and is no less true of the instant case.

This learned court must be thoroughly aware that the prospects of a plaintiff's recovery cannot be arbitrarily measured by the name of the field of law in which it occurs.

The jury determined the fact adversely to appellant. Now appellant seeks to argue the factual nature of the case on appeal; viz. (App. Br. pp. 12-13):

> ". . . taxpayer's tort claim was too contingent and speculative to be compensation for the loss . . ."
>
> ". . . The flood occurred, the property was destroyed, and the loss was sustained . . ."
>
> ". . . Here there has been no problem in identifying the event . . ." (which marks the loss).

These arguments are completely circular. Judge Mathes ably and properly instructed the jury in accordance with the law.

ARGUMENT.

I.

Determination of the Tax Year of Loss Is a Fact Question:

The court below properly submitted to the jury for determination as a question of fact the tax year in which plaintiff sustained a closed and completed loss.

Under an agreed form of verdict, the jury found here that Earl Callan did not sustain a closed and completed loss in 1938, the year of the flood. Accordingly, it found that the loss was closed and completed upon termination of the Flood Control District Litigation in 1948.

The evidence presented to the jury included the actual circumstances of the flood, advice of plaintiff's flood attorneys and engineers, their fee arrangements with plaintiff, testimony of the flood evidence presented to such attorneys and engineers, advice of plaintiff's tax counsel, course of the flood litigation including a substantial verdict therein, taxpayer's testimony of his judgment of the merits of his claim, and one of the flood attorneys' testimony of his own informed belief in recovery.

Appellant's counsel argued to the jury that the evidence showed the loss was completed and sustained in 1938. The jury found against those arguments.

The determination of the tax year in which a loss is sustained is a determination of fact.

Alison v. United States (U. S. S. Ct., 1952), 344 U. S. 167;

Boehm v. Commissioner (U. S. S. Ct., 1945), 326 U. S. 287;

Commissioner of Internal Revenue v. Peterman (C. C. A. 9, 1941), 118 F. 2d 973;

Rhodes v. Commissioner (C. C. A. 6), 100 F. 2d 966, 969;

Ashland Iron and Mining Co. v. United States, 56 F. 2d 466 (Ct. Claims, 1932);

Whitney (1949), 13 T. C. 897, at 899 and 901.

And such a determination is obviously of *ultimate* fact. (*Callan et al. v. Westover* (D. Ct., S. D. Calif. 1953), 116 Fed. Supp. 191.) [R. 72.]

Commissioner of Internal Revenue v. Harwick (C. A. 5, 1950), 184 F. 2d 835 (opinion: "At least the Tax Court's finding that the amount of loss was unascertainable until 1944 is not clearly erroneous").

First National Corporation of Portland v. Commissioner of Internal Revenue (C. C. A. 9, 1945), 147 F. 2d 462 (facts: "The year 1934 marked the close of the transaction . . ." Opinion: "If the question were close we would feel constrained to send the case back for a finding").

II.

Scope of Appellate Review of a Jury Action:

Under the Seventh Amendment to the Constitution, a jury trial of fact questions is guaranteed in a civil action.

> "The court does not weigh the evidence but considers whether there is any or sufficient evidence to sustain a verdict . . . The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced, a verdict can be sustained, not weigh the evidence. If there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict."

United States v. Lesher (C. C. A. 9, 1932), 59 F. 2d 53.

Thus, upon this appeal, the issue presented to the court is whether appellant can show that the evidence in the record and that referred to by the record is not substantial with reference to the verdict of the jury that the loss was not closed and sustained by plaintiff at the end of the year 1938.

III.

Distinguishing the Scope of Appellate Review in Other Case Authorities:

Because none of the appellate decisions in appellant's brief deal with appeals wherein a jury verdict was involved, the effect of those cases can be properly evaluated as precedent herein only after considering the scope of review therein. Appellee considers that those cases are favorable to appellee under any proper construction. But appellee also submits that the instant case, involving a jury verdict, is subject to review of far narrower scope than cases involving findings of ultimate fact by the Tax Court or a trial judge.

In appeals from the Board of Tax Appeals prior to 1926, the appellate courts were free to and did make factual determinations *de novo*. (*Dobson v. Commissioner* (U. S. S. Ct., 1943), 320 U. S. 489.) By the Revenue Act of 1926, limitations were enacted upon the scope of factual review, but the courts, including the Supreme Court, did not pay "scrupulous deference" to this limitation. (*Dobson, supra,* footnote 8.) It was not until the Dobson decision, in 1943, that the courts became strictly bound to refrain from factual determinations upon review of the Board of Tax Appeals. Then on June 25, 1948, Section 1141(a) of Title 26 of the Internal Revenue

Code was amended to its present form by addition of the following italicized words:

> "The circuit courts of appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, *in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury* . . ."

Thus, in reviews of Tax Court decisions after June 25, 1948, the scope of appellate review of factual determinations is prescribed by Rule 52(a) of the Federal Rules of Civil Procedure, and such determinations under that rule may be set aside if "clearly erroneous", giving "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

It appears, therefore, that under the test set forth by this court in *Lesher, supra,* a factual determination by a jury will be reviewed only to determine whether there is "any or sufficient evidence to sustain a verdict." On the other hand, in reviews of factual determinations by a trial court prior to *Dobson, supra,* in 1943, the latitude of review was much broader. Even in appeals decided after the amendment of Section 1141(a), Title 26 of the U. S. Code in 1948, by review under the scope of Rule 52(a), F. R. C. P., the review of determinations of ultimate fact by a trial judge will have greater latitude than review involving a jury verdict, although this court will not review even a judge's determination "unless clear error appears." (*Dwight A. Ward v. Commissioner of Internal Revenue* (C. A. 9, 6/22/55), 224 F. 2d 547, footnote 1, and cases cited therein. See also *United States v. Aluminum Co. of America* (C. C. A. 2, 1945), 148 F. 2d 416 at p. 433.)

In determining this appeal, it is important to distinguish the scope of review in other appellate court cases involving the same general fact situation. When the particular rules governing appellate review in each of those cases is examined, it becomes apparent that all of those cases are consistent with the rule that the issue is one of fact, and that the verdict here, reviewable only for the existence of some substantial evidence, should be sustained.

IV.

Analysis of Cases and Arguments of Appellant:

Coming now to the cases and arguments contained in appellant's brief, appellee first submits in all humility that the learned opinion of the court below [R. 55-73] is a more able and thorough exposition of the proper law of this case than any brief we could submit.

Therefore, this brief will be confined to analysis and, we submit, refutation of arguments of appellant's brief.

First, we urge that the holding of *Alison v. U. S.*, 344 U. S. 167 (1952), and the language contained therein, is obviously intended by the Supreme Court as a holding that determination of the year of loss is a factual question in all cases arising under Section 23(e), IRC, which is the same statutory section involved in our instant case. The financial loss in our instant case was the ultimate consequence of damage caused by a flood. The financial loss involved in the *Alison* Supreme Court decision was the ultimate consequence of a theft. The parallel nature of the two situations may be demonstrated by reference to the language of Section 23(e)(3), which indicates that Congress regarded them as parallel situations.

Section 23(e)(3) reads, in pertinent part, as follows:

> ". . . (3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft."

In the course of its opinion, the Supreme Court said in part as follows:

> ". . . Furthermore, the terms embezzlement and loss are not synonymous. The theft occurs, but whether there is a loss may remain uncertain. One whose funds have been embezzled may pursue the wrongdoer and recover his property wholly or in part. See *Commissioner v. Wilcox*, 327 U. S. 404. Events in the *Alison* case show the practical value of this right of recovery. A substantial proportion of the embezzled funds was recovered in 1941, ten years after the first embezzlement occurred. This recovery alone is ample refutation of the view that a loss is inevitably 'sustained' at the very time an embezzlement is committed."
>
> "Whether and when a deductible loss results from an embezzlement is *a factual question*, a practical one to be decided according to surrounding circumstances. See *Boehm v. Commissioner*, 326 U. S. 287. An inflexible rule is not needed; the statute does not compel it . . ." (Emphasis supplied.)

This language speaks for itself. Citation by the court of *Boehm v. Commissioner* (1945), 326 U. S. 287, a *stock loss* case under Section 23(e), demonstrates that the court regards the *Alison* and *Boehm* cases as controlling *all* determinations of the year of loss under Section 23(e). All such determinations are factual ones. The *Boehm* case proves the fallacy of the restrictions argued by Appellant on brief, pages 17 and 18.

Moreover, the fallacy of such restriction is further shown by the decision of this court in *Douglas County Light and Water Co. v. Commissioner* (C. C. A. 9, 1930), 43 F. 2d 904, wherein this court, deciding the tax year of a loss from an embezzlement discovered in 1916, and settled, after pursuit of the embezzler, in 1922, held the loss year *1922*. Admittedly, this was in the nature of factual review, under the scope of review of the Board then prevailing (see pp. 12-14, *supra*). It demonstrates the absence of any single event as necessarily controlling in determination of the tax year of loss.

Surely a theft is a physical event, no less than a flood, and it cannot be said as a matter of law or fact that recoupment from embezzlers is generally more probable than recoupment from the Los Angeles County Flood Control District. Yet this is what appellant's brief (p. 15) would urge.

In *Cahn v. Commissioner* (C. C. A. 9, 1937), 92 F. 2d 674, reversing 33 B. T. A. 783, this court considered a loss from theft in California in 1924. The insurer, Lloyd's of London, was not licensed to transact business in California, and had no person to accept service of process in this state nor any funds amenable to process in this state. The insurer denied liability, and taxpayer's attorney advised him that suit could not be brought in California, but only in England, which would be prohibitively expensive and probably not result in recovery. In holding that the loss was sustained in the year of theft, 1924, the court said, *inter alia*:

> ". . . in estimating the value of a claim against a foreign insurer suable only abroad, *a business man must rely on the advice of counsel. Here was a claim so uncertain that the insured's attorney advised that*

the prospects of success upon it were not sufficient to justify pursuing it . . ." (Emphasis supplied.)

The court went on to hold that, under these circumstances, the loss was deductible in 1924 even though later the insurer *voluntarily* submitted to suit and partial recovery was obtained.

Counsel believes that this court, in the *Cahn* case, was exercising a scope of factual review in 1937 greater than it would exercise over the jury-determined case now presented. (See above, pp. 12-14.)

But under any scope of review, the crucial importance of "advice of counsel" in evaluating recovery rights is the very essence of the *Cahn* decision.

Surely, a reading of *Cahn* demonstrates appellant's error on brief, pages 13-14:

> ". . . if we assume that taxpayer had claimed his loss in 1938, and the Commissioner had disallowed the deduction, holding that there was no loss so long as a claim for damages existed which the attorneys here involved declared had a reasonable chance of success. We believe it clear that the courts would uphold the taxpayer. *Cahn v. Commissioner,* 92 F. 2d 674 (C. A. 9th)."

On the contrary, *Cahn* is strong authority for the importance attached by the trial court herein to the evidence of the advice of Appellee's flood counsel.

United States v. White Dental Company (1927), 274 U. S. 398, is a decision involving a broader scope of factual review than is present here, especially because of the historical latitude of such review in 1927. (See above, pp. 12-14.) The case resembled *Cahn* in the aspect, which the court emphasized, that the German Government was

not amenable to suit in the year 1918, and in a later year submitted itself to jurisdiction. The court's language demonstrates the existence of a factual determination:

> ". . . we need not attempt to say what constitutes a closed transaction evidencing loss in other situations . . ."

The court's reference to the "destruction or physical injury . . ." of property was pure dictum, purely illustrative by intent, and obviously did not refer to or contemplate a situation where restitution for the physical injury could be expected by the taxpayer. *Alison, supra,* clearly shows the present Supreme Court's opinion on the matter where rights of restitution are involved. Clearly, the Los Angeles Flood Control District was amenable to suit in this case.

Similarly, in *Lewellyn v. Elec. Reduction Co.,* 275 U. S. 243, 247, reference to the "burning of a house" was pure dictum, purely illustrative by intent, and obviously did not refer to or contemplate a situation where restitution for the physical injury could be expected by the taxpayer. Even without restitution rights the dictum is not clear as to the year: ". . . It may well be that he whose house has been burned has sustained a loss whether he knows it or not . . ." Moreover, upon the actual issue presented, the court held that loss from non-delivery of goods paid for in 1918 should be deducted and was sustained in 1922, when the taxpayer's claims for damages become worthless because of defendant's bankruptcy. Surely, non-delivery was a physical event. Moreover, the defendant's liability therein could have been founded upon tort as easily as contract: another example of the fallacy of appellant's argued rule of "law" concerning the tax

effect of the category of appellee's legal rights to recover his damage.

Boehm v. Commissioner (1945), 326 U. S. 287, upon its facts truly involved determination of the tax year of a loss upon the worthlessness of stock, under section 23(e) of the Code. The case is clearly applicable to the year of loss question in all section 23(e) cases. Note *Boehm's* citation as authority in the theft loss case, *Alison, supra.* The tests laid down in *Boehm* are truly applicable in the case at bar. The court's test that *all* pertinent facts and circumstances, "regardless of their objective or subjective nature" are to be considered (pp. 292-293) was clearly followed by Judge Mathes in his instructions to the jury. [R. 161, *et seq.*] And surely counsel for appellant argued the circumstances to the jury. [R. 188-191.]

Appellant's brief (pp. 18-19) is misleading if it purports to state that in *Boehm,* the Supreme Court "did not regard the claim for damages against a third party for destruction of the value of the stock" as material to determination of the loss year. Reading of the last page of the Supreme Court's opinion discloses that the Supreme Court merely held that the Tax Court's "inferences and conclusions on this *factual matter*" was not "so unreasonable from an evidentiary standpoint as to require a reversal of its judgment."

The court, in effect, said: selection of *which* identifiable event establishes the time of loss is a determination of a factual question.

Next, at page 19 of his brief, appellant refers to the rule of annual accounting periods as applicable to losses. Of course, income taxes are computed on annual accounting periods. The question here is a factual one of de-

termining *which* period the loss was completed. Appellant's citation of *Sharp v. Commissioner* (C. A. 6, 1955), 224 F. 2d 920, at this point and at page 14 of his brief, is very interesting. Careful reading of the case will show it is authority for appellee and that appellant has misconstrued the case. In *Sharp,* the *government* argued that a 1945 reduction by the taxpayer in his closing inventory should be disallowed. Gist of the government argument was that (1) a war contract termination claim of taxpayer was in process at the end of 1945, and the inventory reduction represented an indirect effort to take a loss by inventory accounting, and (2) taxpayer's "loss" was not "realized", because the undetermined claim prevented the "loss" being a closed transaction until determination of the claim. (Thus, a position contrary to appellant's position on this appeal.)

The last page of the court's opinion in *Sharp* shows the court agreed with the government's argument in (2) above as a general rule, and held for the taxpayer only because the taxpayer's method of valuing inventory represented "a recognized exception to the necessity of recognizing in income tax returns only closed transactions." Thus, *Sharp,* by its statement of an express exception required by inventory Code sections, proved and expressly reaffirmed the rule applicable to the case here at bar.

Without authority cited, appellant (Br. p. 19) next claims error in the jury instruction that the jury could consider "the success or lack of success" of taxpayer in the prosecution of his claim. Appellee can find no record of this being objected to at the trial. Thus, at this late date, appellant seeks at once to argue that "taxpayer's tort claim was too . . . speculative . . ." (Br. p. 10) and to hide from the jury's consideration the actual

results of that claim. Appellee, on the other hand, was content to give the jury all the evidence and let the jury decide. To the jury, of course, appellant argued strenuously that the results of Appellee's claim were strong evidence against appellee's position herein. [R. 189-190.] Appellant cannot show prejudice. Moreover, appellant's supporting specification of error (No. 8, p. 9 of Br.) fails to set out the grounds urged as error at the trial, and violates this court's Rule 18(2)(d). But, in any event, consideration of "the success or lack of success" is a proper objective circumstance and evidence to be considered as a part of all the surrounding circumstances. *First National Corporation of Portland, supra* ("Substantial recoveries were in fact made on all three of the items . . ."); *Alison, supra,* (". . . A substantial proportion of the embezzled funds was recovered in 1941, ten years after the first embezzlement occurred . . ."). *Douglas County Light and Water Co., supra.*

Next, appellant's brief (p. 19) cites *Commissioner v. Highway Trailer Co.* (C. A. 7, 1934), 72 F. 2d 913. There the court, reversed a well reasoned opinion of the Board of Tax Appeals (28 B. T. A. 792), while admitting "It is difficult . . . to deduce a rule from which to decide this case." Appellee submits that the court was there reviewing a factual determination of the Board of Tax Appeals under the appellate practice then existing (see above pp. 12-14), and that the court might have refused even in 1934 to review a jury determination. In any case, the decision, insofar as it may characterize the matter as a law question, is overruled by *Boehm* and *Alison, supra,* which clearly hold the tax year of

loss a fact question. Even in 1934, the case would be inapplicable in Ninth Circuit.

Peterman, supra;
Douglas County Light and Water Co., supra;
Cahn, supra;
First National Corporation of Portland, supra.

The modern approach to the question is shown in *Commissioner v. Harwick* (C. A. 5, 1950), 184 F. 2d 835, where the court refused to reverse (and thereby affirmed) a Tax Court determination of fact that the loss was not sustained in the earlier tax year of shipwreck, although the insurance claim was then unliquidated and perhaps might later prove to have no value, but that the loss was ascertainable and sustained in the later year in which the claim was settled.

Appellant's brief (pp. 14-15) while distorting the effect of the court's instructions, nevertheless admits that the opinion and instructions of the court below were to the effect that the jury should find whether the loss was sustained in the tax year 1938. But his brief there cites numerous cases involving the taxability of income to a taxpayer (Sec. 22 of the Internal Revenue Code) as authority upon the meaning of section 23(e) of the Internal Revenue Code. The cases cited by appellant are not in point because they concern a different statutory section and a different question. The cases cited throughout this brief make it clear that the words of section 23(e), "losses sustained during the taxable year and not compensated for by insurance or otherwise", are construed together as a whole, not separately, and that the courts consider the problem to determine in a given case whether the loss in question is evidenced by a

"closed and completed transaction." [Mathes, J., R. pp. 62-63, 67-68.] Surely in *Alison, supra,* and in *Douglas County Light and Water Co., supra,* neither the Supreme Court nor this court, respectively, were deciding, as two separate issues, under section 23(e), whether there was, first, a loss deductible in the theft year and, secondly, compensation which was taxable income. It is obvious, from a reading of those decisions, that the respective courts considered the question as a whole, *i. e.,* whether there was a closed and realized loss of the taxpayer's investment—that is, *which* of the ascertainable events marked the practical closing of the loss. And *Alison,* which is not only controlling but probably the most recent direct appellate decision in the entire field, expressly held this a single question of fact. See also *Commissioner v. Harwick, supra.*

It is clear from the jury instructions [R. 163] and the [R. 168] agreed form of verdict [R. 114] that the issue was submitted to the jury as determination of the year in which the loss was finally sustained.

V.

No Error in Jury Instructions.

We come now to the claim by Appellant's Brief, page 20, of error in the court's refusal to give requested instruction No. 5. This refusal, says appellant, caused the instructions given to erroneously allow "controlling weight to taxpayer's state of mind."

This claim deals with appellant's specification of error No. 15 (p. 10 of Br.).

First, appellee believes that this argument should be ignored because appellant's said specification of error has

failed to comply with Rule 18(2)(d) of the rules of this court. See this Brief above, pages 12-14. Moreover, the said specification's citation to the record [R. 103] shows, upon reference, that the "grounds" cited at R. 103 were simply the regulation itself, and the trial court's own memorandum of decision. Yet the requested instruction did not even embody the whole portion of the regulation quoted by the trial court [R. 60] as relevant. The objections of appellant at the trial were "cryptic". (*Kobey, supra.*)

Second, if this court nevertheless considers this specification No. 15, appellee submits that here, the material issues in the case were comprehensively and correctly covered in the instructions given. [See explanatory opinion of Mathes, J., R. 60-72.] The entire instructions of the trial court on this issue [R. 160-163] are directed to an explanation in plain English of tests laid down by the courts for determining the fact of the tax year in which the loss became closed. Appellant's Requested Instruction No. 5 was properly refused because "the court is not required to give a requested instruction in terms to suit the desire of the party tendering it, even though it be a correct statement of law." (*Profaci v. Mamiapro Realty Corp.* (C. A. 10, 1954), 216 F. 2d 885.)

The instructions must be considered as a whole. (*Barcott v. U. S.* (C. A. 9, 1948), 169 F. 2d 929, 932, cert. den., 1949, 336 U. S. 912, 913.)

Third, a reading of the whole record shows that the judgment in this case would not have been different had the refused instruction been given. (*Kotteakos v. United States,* 328 U. S. 750.)

Fourth, under the instructions the jury was to "consider all the surrounding circumstances as shown by the evidence", including such objective facts as the date of the physical loss, disclosures to his flood attorneys, success or lack of success in prosecuting the flood case, the objective reasonableness of his pursuit of recoupment and therefore the merit, reasonably ascertainable to taxpayer of his flood case. [R. 161-163.] Any ordinary person understands that the reasonableness and "ordinary business care and prudence" of conduct is measured by the ascertainable circumstances; and does not mean a merely subjective belief, but includes all circumstances, subjective and objective. Appellee submits that Judge Mathes' opinion [R. 64-71, incl.], amply and precisely sets forth the reasoning and judicial authorities with which the jury instructions properly conform.

Conclusion.

Determination of the tax year of loss is a factual question. That question was here properly submitted to the jury and determined by the jury. The judgment of the court below should be affirmed.

Respectfully submitted,

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Attorney for Appellees.